# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>March 16, 2006 |
| v | No. 258437<br>Macomb Circuit Court |
| ELGIN RICHARD MARION,<br><br>Defendant-Appellant. | LC No. 03-003604-FC |

Before: Davis, P.J., Cavanagh and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to consecutive terms of 137 months to 60 years' imprisonment for the armed robbery conviction and two years' imprisonment for the felony-firearm conviction. This case stems from the robbery of a CVS Pharmacy at 16 Mile Road and Garfield in Macomb County. We affirm.

On June 7, 2003, a man wearing a heavy, navy-blue coat that came down to his waist and a black knit skullcap entered the CVS Pharmacy at 16 Mile and Garfield in Macomb County around 9:58 P.M. (approximately two minutes before closing). The man was carrying a small black handgun with a taped handle. Upon entering the store, the man locked the doors behind him and forced two CVS employees, Brian Hilton and Denise Newell, to lead him to the safe located in a small office at the back of the store. During this time, the man asked, "does anybody feel like dying tonight?" Once inside the office, the man ordered Hilton to get under a desk while Newell opened the safe and offered the man the change drawer. The man told Newell he wanted the deposits, which Newell gave him. The robber then fled. Hilton testified that on September 1, 2003, he was present for a physical lineup at the Oakland County Jail where he identified defendant both by his appearance and the sound of his voice as the man who had robbed the CVS.

Prior to trial, the prosecutor sought and was granted permission to introduce prior bad acts evidence. Pursuant to this ruling, Amy Picciurro, a shift supervisor at the CVS Pharmacy at 17 Mile and Hayes in Macomb County, testified that on February 15, 2003, a man wearing a black knit hat or bandanna entered that store about ten minutes prior to that store's closing time of 10:00 P.M. Picciurro identified defendant as the man. Picciurro stated that defendant covered his nose and mouth with his turtleneck sweater, pointed a handgun with a taped handle at her,

and locked the entrance door behind him. Defendant instructed Picciurro and the two other employees in that store to take him to the back office. Because the office door was locked, Picciurro and the employees took defendant back to the register at the front of that store. Picciurro told defendant he could have the money in the register. At this, defendant became agitated and said, "well, someone's gonna die tonight." After leading defendant back to the office a second time, defendant fled. Picciurro also identified defendant at a lineup at the Oakland County Sheriff's Department on September 10, 2003.

Defendant argues that the trial court erred in admitting bad acts evidence. We disagree. We review the trial court's admission of bad acts evidence for abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). MRE 404(b) governs admission of other bad acts evidence. It provides as follows:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, *scheme, plan, or system in doing an act*, knowledge, *identity*, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case. [Emphasis added.]

Evidence of other crimes, wrongs, or acts is admissible under MRE 404(b) if such evidence is (1) offered for a proper purpose and not to prove the defendant's character or propensity to commit the crime,[1] (2) relevant to an issue or fact of consequence at trial, and (3) the danger of unfair prejudice does not substantially outweigh the probative value of the evidence under MRE 403.[2] *People v VanderVliet*, 444 Mich 52, 55, 74-75; 508 NW2d 114 (1993). Finally, the trial court, upon request, may provide a limiting instruction under MRE 105. *Id.* at 75.

In its pretrial motion, the prosecution indicated that the evidence would be offered to prove knowledge, absence of mistake, motive and intent. The court instructed the jurors that they

> [m]ay only think about whether this evidence tends to show that the defendant acted purposefully. That is, not by accident or mistake or because he misjudge[d] a situation. That the defendant used a plan, system, or characteristic scheme that he has used before or since. *Who committed the crime that the defendant is charged with*. . . . That the defendant specifically meant to commit armed robbery.

[1] "The prosecution's recitation of purposes at trial does not restrict appellate courts in reviewing a trial courts decision to admit the evidence." *People v Sabin* (*After Remand*), 463 Mich 43, 59-60 n 6; 614 NW2d 888 (2000).

[2] MRE 403 provides in relevant part that "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice."

> You must not consider this evidence for any other purpose. For example, you must not decide that it shows that the defendant is a bad person or that he is likely to commit crimes. You must not convict the defendant here because you think he is guilty of other bad conduct. [Emphasis added.]

Thus, Picciurro's testimony was offered for the proper purpose of identifying defendant as the person who employed a common plan, system, or characteristic scheme in carrying out the two robberies. *VanderVliet*, *supra* at 65. Further, the court provided a clear limiting instruction, which defendant has not challenged on appeal.

When a modus operandi theory is used to prove identity, there must be substantial proof that the defendant committed the previous act, the act must have a special quality or circumstance tending to prove the defendant's identity, and the identity of the perpetrator must be at issue in the trial. *VanderVliet*, *supra* at 66-67 n 16.[3] Moreover, in *People v Golochowicz,* 413 Mich 298, 310; 319 NW2d 518 (1982), our Supreme Court noted that evidence of prior bad acts may be used to prove the identity of the perpetrator "only where the circumstances and manner in which the two crimes were committed are '[so] nearly identical in method as to earmark [the charged offense] as the handiwork of the accused.'" (Alterations original, citation omitted.)

Picciurro's testimony provides substantial evidence that the uncharged crime actually occurred. In both incidents, the perpetrator wore a dark colored knit hat, entered the CVS Pharmacies shortly before closing, locked the entrance doors behind him, pointed a small handgun with a taped handle at the employees, forced the employees to lead him to a back office, and even made statements to both stores' employees about "dying tonight." The almost identical nature of these two crimes supports the inference that defendant committed the crime charged. Thus, the testimony was relevant to the issue of identity.

Turning to the third prong of *VanderVliet,* although it is true that the introduction of these prior bad acts was damaging to defendant, that alone is not sufficient to create unfair prejudice. *People v Mills*, 450 Mich 61, 75-76; 537 NW2d 909, mod on rehearing on other grounds 450 Mich 1212 (1995). In this case, there is no indication that the jury gave undue weight to the prior bad acts evidence. In fact, the jury heard the detailed accounts from the eyewitnesses of the incident for which defendant is charged, and Hilton positively identified defendant both at trial and in a lineup. Thus, it does not even appear that the admission of the MRE 404(b) evidence

[3] This Court concluded in *People v Ho*, 231 Mich App 178, 186; 585 NW2d 357 (1998), that, "[a]lthough the *VanderVliet* Court adopted a new test for admission of evidence under MRE 404(b), the four-part test of *People v Golochowicz*, 413 Mich 298, 309; 319 NW2d 518 (1982), remains valid to show logical relevance where similar-acts evidence is offered to show identification through modus operandi." This test requires that (1) there is substantial evidence that the defendant committed the similar act, (2) there is some special quality of the act that tends to prove the defendant's identity, (3) the evidence is material to the defendant's guilt, and (4) the probative value of the evidence sought to be introduced is not substantially outweighed by the danger of unfair prejudice. *Golochowicz, supra* at 309.

was outcome determinative. *People v Knapp*, 244 Mich App 361, 378; 624 NW2d 227 (2001). Therefore, the trial court did not err in admitting evidence pursuant to MRE 404(b).

Next, defendant argues that the prosecution presented insufficient evidence on the issue of identity to support his convictions.[4] Again, we disagree. We review an assertion of insufficient evidence de novo in the light most favorable to the prosecution. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005).

Hilton identified defendant both at trial and at a pretrial lineup. Regarding the identification at trial, Hilton testified that he was "positive" defendant was the man who robbed the CVS. Moreover, Hilton testified there was "no doubt in my mind" when he identified defendant both by appearance and the sound of his voice at the pretrial lineup. In addition, Newell explained that she did not make a positive identification of defendant at the lineup because she wanted to be "absolutely sure," but that she had a "gut feeling" that she knew the perpetrator was defendant, who was in the lineup. The testimony of Hilton and Newell is sufficient to prove the elements of the crimes charged beyond a reasonable doubt. *People v Daniels*, 172 Mich App 374, 378; 431 NW2d 846 (1988); *People v Thomas*, 7 Mich App 103, 104; 151 NW2d 186 (1967).

Defendant also asserts that the lack of physical evidence (particularly fingerprint evidence) also undermines the reliability of the verdict. However, there is no evidentiary requirement that physical evidence need be introduced on the issue of identity. Circumstantial evidence and reasonable inferences arising from that evidence may be sufficient to prove the elements of a crime. *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). Further, Picciurro's testimony supported the conclusion that defendant was the man who robbed the CVS in issue. Thus, viewing the evidence in the light most favorable to the prosecutor, there was sufficient evidence for a reasonable jury to conclude beyond a reasonable doubt that defendant had committed the crimes charged.

Last, defendant argues that he was denied his right to a speedy trial. This issue is not preserved for appeal because defendant failed "make a formal demand on the record that he be brought to trial." *People v Rogers*, 35 Mich App 547, 551; 192 NW2d 640 (1971). The Court reviews unpreserved issues for plain error affecting substantial rights. *People v Rodriguez*, 251 Mich App 10, 32; 650 NW2d 96 (2002).

Criminal defendants are guaranteed the right to a speedy trial by both the federal and state constitutions, as well as by state statute. US Const, Am VI; Const 1963, art 1, § 20, MCL 768.1; *People v Cain*, 238 Mich App 95, 111; 605 NW2d 28 (1999). To determine if a pretrial delay violated defendant's right to a speedy trial, the Court must apply the following four-part balancing test, considering the following factors: (1) the length of the delay, (2) the reasons for the delay, (3) the defendant's assertion of the right, and (4) prejudice to the defendant. *Barker v*

[4] Defendant's argument is predicated on an assumption that eyewitness testimony in general is unreliable. In support of this proposition, defendant quotes at length from *People v Anderson*, 389 Mich 155; 205 NW2d 461 (1973), which was specifically overruled in *People v Hickman*, 470 Mich 602; 684 NW2d 267 (2004).

*Wingo*, 407 US 514, 530; 92 S Ct 2182; 33 L Ed 2d 101 (1972); see also *People v Hill*, 402 Mich 272, 283; 262 NW2d 641 (1978).

Regarding the first factor, "[t]he length of delay is not determinative of a speedy trial claim." *People v Missouri*, 100 Mich App 310, 319-320; 299 NW2d 346 (1980). Relying on *Missouri*, the Court in *Cain* held that the 27-month delay of the defendant in that case was not a constitutional violation. *Cain, supra* at 111-114. *Cain* noted that the length of the delay did not "approach the outer limits of other delays we have addressed," thus making the weight of this factor negligible. *Id.* at 112. In the instant case, the delay from the time the warrant was issued until trial was just over nine months—one third of the delay experienced in *Cain*.

With respect to the second factor, the Court must examine each delay and determine whether each was due to the prosecutor or defendant. See *People v Ross*, 145 Mich App 483, 491; 378 NW2d 517 (1985). Although the prosecutor is deemed responsible for delays due to scheduling or for unexplained delays, *id*., these delays "are given a neutral tint and only minimal weight in determining whether a defendant was denied a speedy trial." *People v Gilmore*, 222 Mich App 442, 460; 564 NW2d 158 (1997), quoting *People v Wickham*, 200 Mich App 106, 111; 503 NW2d 701 (1993). In the instant case, defendant's original trial date was postponed four different times, each attributable to the prosecution. While these reasons weigh against the prosecution, they are only accorded minimal weight, especially in light of the fact that defendant has made no showing regarding how any of these delays "seriously affected the fairness, integrity, or public reputation of judicial proceedings." *People v Walker*, 265 Mich App 530, 542; 697 NW2d 159 (2005).

Concerning the third factor, defendant's failure to promptly assert his right to a speedy trial weighs against his subsequent claim that he was denied that right. See *People v Rosengren*, 159 Mich App 492, 508; 407 NW2d 391 (1987).

Finally, the fourth factor requires a defendant to prove he suffered prejudice if the delay is fewer than eighteen months. *Cain, supra* at 112. There are two types of prejudice in this context. First, the delay may prejudice the person by denying civil liberties; second, and more crucial, the delay may prejudice the actual defense. *Gilmore, supra* at 461-462; *People v Ovegian*, 106 Mich App 279, 284-285; 307 NW2d 472 (1981). It is insufficient for the defendant to make a general claim of prejudice due to delay, such as the unspecified loss of evidence or memory, or "mental anxiety" to support a claim of the denial of a speedy trial. *Gilmore, supra* at 462.

In the instant case, defendant alleges he suffered prejudice to his person in the form of "anxiety, depression, stress, and mental anguish," as well memory loss (presumably of potential witnesses). *Gilmore* expressly provides that defendant's assertions regarding anxiety related conditions are insufficient to show prejudice. *Gilmore, supra* at 462. Further, the record does not support defendant's assertion that he lost valuable witnesses. There is no indication on the record that any people other than Hilton and Newell were present during the robbery. Thus, defendant's bare assertion amounts to nothing more than an unspecified loss of evidence, which is a claim insufficient to support prejudice to the defense. *Id.*

Defendant further argues that he suffered prejudice because the prosecutor violated the 180-day rule, which provides that an accused must be brought to trial within 180 days after the

prosecutor learns the defendant is already in state prison or after the Department of Corrections knows or has reason to know an incarcerated defendant is facing another criminal charge. MCL 780.131(1); *People v Crawford*, 232 Mich App 608, 612-613; 591 NW2d 669 (1998). However, defendant's reliance on that rule is misplaced because "the statute applies only to those defendants who, at the time of trial, are currently serving in one of our state penal institutions, and not to individuals awaiting trial in a county jail." *People v McLaughlin*, 258 Mich App 635, 643; 672 NW2d 860 (2003). Because defendant was imprisoned in the county jail, the 180-day rule is inapplicable.[5]

Thus, because any delay experienced was negligible, the reasons for the delay were slight, defendant failed to assert this right before appeal, and his claims of prejudice are insufficient, defendant has failed to show plain error affecting his substantial rights with respect to the timing of his trial.

Affirmed.

/s/ Alton T. Davis
/s/ Mark J. Cavanagh
/s/ Michael J. Talbot

[5] Defendant's argument that his bail was unreasonable is not properly raised on appeal. See MCR 6.106(H) and *People v Edmond*, 81 Mich App 743, 749; 266 NW2d 640 (1978) (holding that "a bail decision is not appealable as of right to this Court by claim of appeal").